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**Should the law regarding assisted suicide in the United Kingdom be reformed?**

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**by**

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## Introduction

'To please no one will I prescribe a deadly drug nor give advice which may cause his death,'<sup>1</sup> states the Hippocratic Oath. The significance of this document stands strong to this day evident by the relevance it still has within the medical profession<sup>2</sup>; however, this quote indicates that a doctor should not assist the death of its patients. Assisted suicide is a controversial topic that is subject to much debate between ethicists due to its ethical complexities.

Despite the failed attempts of many individuals who have brought a case regarding assisted suicide to the courts, such as *Pretty*,<sup>3</sup> *Nicklinson*<sup>4</sup> and *Purdy*,<sup>5</sup> the need for a change in legislation has continued to be pushed.<sup>6</sup> It is evidential that assisted suicide conflicts with many medical ethics such as autonomy, religion and human rights which will be discussed in this article. Despite the arguments against assisted suicide, the need for reform only gets stronger as more countries legalise it.

What follows is a detailed explanation of the current law in operation and critical analysis of both the opinions of those for and against the change of law. Consideration to medical ethics will run throughout this article, with particular emphasis on why assisted suicide should be lawful to support the autonomy of the patient. The concluding chapter will discuss whether or not it is time for the United Kingdom to reform the law.

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<sup>1</sup> The Free Dictionary Medical Dictionary 'Hippocratic Oath' <<https://medical-dictionary.thefreedictionary.com/Hippocratic+Oath>> accessed 9<sup>th</sup> March 2021 (**get from dictionary**)

<sup>2</sup> Lexico, 'Meaning of Hippocratic Oath' <[https://www.lexico.com/definition/hippocratic\\_oath](https://www.lexico.com/definition/hippocratic_oath)> accessed 9<sup>th</sup> March 2021

<sup>3</sup> R (on the application of *Pretty*) v DPP [2001] 3 W.L.R. 1598

<sup>4</sup> R (*Nicklinson*) v Ministry of Justice [2014] UKSC 38

<sup>5</sup> R. (on the application of *Purdy*) v DPP [2009] UKHL 45

<sup>6</sup> Assisted Dying Bill [HL] 2019-21

## Chapter one

Currently in the UK, assisted suicide is illegal. Under the Suicide Act 1961,

“A person who aids, abets, counsels or procures the suicide of another, or an attempt by another to commit suicide, shall be liable on conviction on indictment to imprisonment for a term not exceeding 14 years.”<sup>7</sup>

There are many organisations, such as Dignity in Dying, that believe everyone has the right to a good death.<sup>8</sup>

Dignity in Dying points out that in the 2010 British Social Attitudes survey, 82% of the general public believed that a doctor should probably or definitely be allowed to end the life of a patient with a painful incurable disease at the patient's request.<sup>9</sup> This was then analysed further showing 71% of religious people and 92% of non-religious people supported this statement.<sup>10</sup> These statistics are interesting because one of the many reasons assisted suicide is frowned upon is due to religion. Pope Francis has expressed his opinion on physician-hastened death, explaining that he believes it is “false compassion” which devalues and dehumanises the sick.<sup>11</sup>

Other religions such as Hinduism and Buddhism<sup>12</sup> are also anti-assisted suicide. Although each religion has their own views as to why they are against assisted suicide or anything of the sort, a running theme is that they cannot justify taking a human life. Despite this, the fact that 71% of religious people voted in favour of assisted suicide suggests that more people support change.

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<sup>7</sup> Suicide Act 1961 Section 2(1)

<sup>8</sup> Campaign for Dignity in Dying ‘About Us’ <<https://www.dignityindying.org.uk/about-us/>> accessed 10<sup>th</sup> April 2021

<sup>9</sup> British Social Attitudes survey: 2010 The British Humanist Association Retrieved 8 June 2014 ‘Religion and belief: some surveys and statistics’ <<https://humanism.org.uk/campaigns/religion-and-belief-some-surveys-and-statistics/>> accessed 9<sup>th</sup> March 2021

<sup>10</sup> Ibid

<sup>11</sup> Death with Dignity ‘Religion and Spirituality’ <<https://www.deathwithdignity.org/learn/religion-spirituality/>> accessed 9<sup>th</sup> March 2021

<sup>12</sup> Ibid

Other statistics show that 93% of people in the UK approved of, or would not rule out, assisted suicide administered by a doctor if the person is terminally ill.<sup>13</sup>

My death, My decisions chief executive spoke of these results saying,

“These results show that the gulf between our politicians and the public is widening, as assisted dying becomes increasingly acceptable. Time and time again we have told our decision-makers that the right to choose the manner and timing of your own death is a fundamental human right. Yet, time and time again, their inaction has let down families.”<sup>14</sup>

This suggests a divide between the lawmakers and the rest of society. Ultimately, politicians should start listening to what the public believe is a fundamental human right.

Not only this, Foster discussed the concern for suicide tourism and the fact there is something ‘intellectually, if not morally, uncomfortable, about getting another country to do your dirty work.’<sup>15</sup> The UK Assisted Dying Coalition has collected figures showing that more than one person a week now travels from Britain to Switzerland in order to end their life.<sup>16</sup> It can be interpreted that the fact other countries are doing the dirty work is because the lawmakers are too afraid to accept the cycle of life and respect their citizens autonomy.

Not only should the UK respect citizens autonomy, but also their human rights. Foster acknowledged,

“Legally, the issue is whether the right to life, or any other Convention right, incorporates the right to die, and whether any restriction on any such right is

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<sup>13</sup> The Guardian Owen Bowcott, ‘Legalise assisted dying for terminally ill, say 90% of people in the UK’ (3<sup>rd</sup> March 2019) < <https://www.theguardian.com/society/2019/mar/03/legalise-assisted-dying-for-terminally-ill-say-90-per-cent-of-people-in-uk>> accessed 21<sup>st</sup> March 2021

<sup>14</sup> Ibid

<sup>15</sup> Charles Foster – ‘Suicide tourism may change attitudes to assisted suicide, but not through the courts’ (2015) 41 Journal of Medical Ethics 8

<sup>16</sup> (n11)

necessary and proportionate under the tests laid down in the European Convention on Human Rights”<sup>17</sup>

It can be argued that there are many human rights that are breached when not allowing an individual the right to assisted suicide. A right to life<sup>18</sup> can be reversed when arguing that we also have the right to end that life, if we choose. This human right could be interpreted broadly to include the decisions about the quality of life, including about death if that life is no longer one of quality. On the other hand, many may interpret a right to life in order to argue against assisted suicide, as every human has a right to life and a doctor should not take this life. Blake is of the view that, if anything, a right to life is most likely to be an argument against assisted suicide, as it is incompatible with the state’s obligation to protect life.<sup>19</sup> Lord Hope noted that article 2,

“Does not say that every person has the right to choose how or when to die. Nor does it say that the individual has a right to choose death rather than life. What the first sentence does—and all it does—is to state that the right to life must be protected by law.”<sup>20</sup>

Ultimately, the courts found for the opposite to this alternative argument in the case of *Pretty*.<sup>21</sup>

Freedom from torture<sup>22</sup> can also be argued to be breached. In the case of *NHS Trust A v M*,<sup>23</sup> it was held that article 3 was inapplicable as it required the victim to be aware of the inhuman and degrading treatment and, M was unaware of the treatment and would also be unaware of its withdrawal.<sup>24</sup> Essentially, this case is saying that it is acceptable to torture unconscious

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<sup>17</sup> Steve Foster ‘Human rights, judicial activism or deference and the case of assisted suicide’ *Cov. L.J.* 2019, 24(1), 69-86

<sup>18</sup> Human Rights Act 1998 Article 2

<sup>19</sup> Meredith Blake ‘Physician-Assisted Suicide: a Criminal Offence or a Patient's Right?’ (1997) 5 *Medical Law Review* 294, 306

<sup>20</sup> (n3) [87]

<sup>21</sup> (n3)

<sup>22</sup> Human Rights Act 1998 Article 3

<sup>23</sup> [2001] *Fam.* 348

<sup>24</sup> *Ibid* 363

individuals. However, the judge could have interpreted this by stating if the individual is not unconscious, such as those terminally ill patients wanting help to die, they are aware of the torture and so their article 3 rights are breached. It was submitted in the Pretty case<sup>25</sup> that the state is not inflicting the inhuman or degrading treatment; the illness was.<sup>26</sup> Alternatively, the state could have interpreted this as they are causing the torture by not allowing Diane Pretty to step out of her situation, breaching the article 3 rights.

Respect for private and family life<sup>27</sup> can also possibly be breached. Article 8 is discernible from all other rights set out in the Convention as none of them talk in terms of a right to respect for, rather, simply declaring a solid right.<sup>28</sup> "Respect for" has been criticised for diluting the article 8 rights. Sir James Fawcett, suggested that respect "belongs to the world of manners rather than the law".<sup>29</sup> However, rather than this being negative, this could mean that the potential scope is far reaching, as respect is interpreted differently to everyone so therefore this right is not a one fits all.

Lastly, protection from discrimination in respect of these rights and freedoms<sup>30</sup> is arguably breached. In 1961, suicide and attempted suicide were decriminalised, as stated in Section 1 of the Suicide Act: "*The rule of law whereby it is a crime for a person to commit suicide is hereby abrogated.*" Since suicide has been legalised,<sup>31</sup> those individuals are able to end their lives, if they wish. However, terminally ill individuals cannot end their lives from suicide if they need help. This is arguably discrimination. The change in legislation was not to punish those who had attempted suicide but failed, but rather to assist them with medical help and treatment.<sup>32</sup> However, we do punish those who want to end their lives because they are terminally ill by not allowing them to die.<sup>33</sup> The court acknowledged that "a person may refuse

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<sup>25</sup> (n3)

<sup>26</sup> Ibid [13]

<sup>27</sup> Human Rights Act 1998 Article 8

<sup>28</sup> Dan Morris 'Assisted suicide under the European Convention on Human Rights: a critique' E.H.R.L.R. 2003, 1, 65-91

<sup>29</sup> J.E.S. Fawcett, *The Application of the European Convention on Human Rights* (2nd ed.) (Oxford: Clarendon Press, 1987), p.211.

<sup>30</sup> Human Rights Act 1998 Article 14

<sup>31</sup> Suicide Act 1961 Section 1

<sup>32</sup> Ibid

<sup>33</sup> (n7)

life-saving or life-prolonging medical treatment and may lawfully choose to commit suicide.”<sup>34</sup> The same treatment and lawfulness should be extended to those who need assistance, removing this potential element of discrimination.

Same sex marriages were once unacceptable in our society but in recent years has been legalised in the United Kingdom.<sup>35</sup> With time society has become more comfortable with this, evident by the change in legislation. Although love and death are different, neither can be controlled. Individuals cannot control when their body decides it is no longer able to function and give a quality-of-life worth living. If society has become comfortable with same sex marriage, it is only a matter of time until they become comfortable with the unavoidable that is death.

Despite the statistics in favour of assisted suicide, in 2014, Lord Falconer proposed an Assisted Dying Bill. The Bill was to propose that a terminally ill and mentally competent adult would be allowed to have an assisted death, on the condition that two doctors had approved this.<sup>36</sup> The Bill failed as there was not enough time for it to be debated before the end of Parliament.

After the failure of the 2014 Bill, MP Rob Marris introduced an Assisted Dying Bill in 2015 based on Lord Falconer’s failed attempt. However, this also failed. On the 11<sup>th</sup> September 2015, 330 MPs voted against it, with only 118 voting in favour of it.<sup>37</sup>

After the failure of the second Assisted Dying Bill, the decision in the case of *The Queen on the application of Philippe George Newby v The Secretary of State for Justice*<sup>38</sup> showed that the court rejected to address the incompatibility of section 2(1) of the 1961 Act with Articles 2 and 8 and that this matter was more appropriate to be debated in Parliament, rather than Court.

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<sup>34</sup> (n3) [4]

<sup>35</sup> Marriage (Same Sex Couples) Act 2013

<sup>36</sup> Assisted Dying Bill [HL] 2014-15

<sup>37</sup> Assisted Dying (No.2) Bill [HL] 2015-16

<sup>38</sup> [2019] EWHC 3118



“the court is not an appropriate forum for the discussion of the sanctity of life, or for resolution of such matters which go beyond analysis of evidence or judgment governed by legal principle.”<sup>39</sup>

It appears we must wait for Parliament to make the decision on whether the law should change.<sup>40</sup> However, a new Bill is currently in Parliament being debated. Three Bills have now been in debate on the same issue, suggesting change is needed. A Bill to enable competent adults who are terminally ill to be provided at their request with specified assistance to end their own life; and for connected purposes<sup>41</sup> has gone through its first reading in the House of Commons with a date yet to be scheduled for its second hearing.

Currently, the question arises as to whether or not the pandemic has opened the doors to debate on this controversial issue. Due to the coronavirus outbreak in 2020, this made it extremely difficult for those wanting to end their life with dignity, sparking debate between the Health Secretary, Matt Hancock and MPs.<sup>42</sup>

Sarah Wootton, chief executive of campaign group Dignity in Dying, said:

"The pandemic has proven what we have long known, that banning assisted dying does not protect people; it merely drives the practice overseas and underground and criminalises acts of genuine compassion."<sup>43</sup>

Due to the UK banning international travel, this led to Hancock discussing what constituted as a “reasonable excuse” when leaving the country during the pandemic.

“How we best support people in their choices at the end of their life is a complex moral issue that, when considered, weighs heavily upon us all.”<sup>44</sup>

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<sup>39</sup> Ibid [50]

<sup>40</sup> Steve Foster ‘Back to you: judicial deference, Parliament and the right to die.’ *Cov. L.J.* 2019, 24(2), 105-115

<sup>41</sup> Assisted Dying Bill [HL] 2019-21

<sup>42</sup> BBC News ‘Covid-19: Assisted dying travel allowed during lockdown, says Hancock’ 5<sup>th</sup> November 2020 < <https://www.bbc.co.uk/news/uk-politics-54823490>> accessed 4<sup>th</sup> April 2021

<sup>43</sup> Ibid

<sup>44</sup> (n42)

He continued, “we should make sure that this conversation and discussion happens, that there is rightly a debate about this topic,” emphasising that it was important for the debate to take place “within a broader discussion about how we care for people at the end of their lives.”<sup>45</sup> This suggests reform may take place sooner than anticipated.

Conservative MP Daniel Kawczynski told his opinion on the subject had been changed by his constituent Noel Conway:

"I said to him, 'why don't you go to Switzerland?'. And his answer will stay with me forever: 'No, I'm an Englishman, I want to die in England.' And I think it's extremely important that our citizens have this right."<sup>46</sup>

On the other hand, Fiona Bruce highlighted that the coronavirus pandemic had left people feeling vulnerable. She voiced her opinion that it would be completely inappropriate and insensitive to consider making access to any form of suicide easier during this difficult time.<sup>47</sup>

Likewise, Dr Gordon Macdonald, chief executive of Care Not Killing, expressed his concern for another push to legalise assisted suicide and euthanasia in the midst of the coronavirus pandemic.

"At a time when we have seen how fragile our NHS is, how underfunding puts pressure on services, and when up to one in four Brits who would benefit from palliative care, but does not currently receive it, to be pushing this ideological policy, seems out of touch, dangerous and desperate."<sup>48</sup>

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<sup>45</sup> HC Coronavirus Regulations: Assisted Deaths Abroad Deb volume 683 Thursday 5<sup>th</sup> November 2020 <<https://hansard.parliament.uk/commons/2020-11-05/debates/A10D8E3C-C301-4163-890F-775B6E48F192/CoronavirusRegulationsAssistedDeathsAbroad>> accessed 15<sup>th</sup> March 2021

<sup>46</sup> Ibid

<sup>47</sup> (n42)

<sup>48</sup> BBC News Helen Wilkinson ‘Assisted dying inquiry essential, leading brain surgeon says’ <<https://www.bbc.co.uk/news/uk-56597771>> accessed 10<sup>th</sup> April 2021

Despite this, in terms of utilitarianism, it is practical to allow assisted suicide because not only do these individuals want to end their life which respects their autonomy, they are taking up medical care and this will free up beds. Essentially, too many people require palliative care but do not receive this care,<sup>49</sup> by freeing up beds it means that more people will get the care they deserve.

To conclude, lawmakers should begin to acknowledge the need for change and understand that enough is enough. The Bill that has been proposed allows those who are terminally ill to seek peace. The Bill enables these fully competent adults to exercise their autonomy and make their own decisions, decisions which should be respected. Overall, these opinions and the continuance of Bills before Parliament suggest that change is inevitable.

## **Chapter two**

The current law in the United Kingdom has changed since the first right-to-die case. The first case to reach what was then called the House of Lords, was the case of Dianne Pretty.<sup>50</sup> Lord Bingham held that the House of Lords was not a legislative body and therefore unable to make ethical and moral decisions, but only “ascertain and apply the law of the land.”<sup>51</sup>

Since 1999, Dianne Pretty suffered from motor neuron disease, a progressive, neurodegenerative and terminal disease, which causes progressive muscle weakness.<sup>52</sup> Despite the human rights arguments, the court held that the Director of Public Prosecutions (DPP) cannot be compelled to grant immunity to a proposed/future criminal offence.<sup>53</sup> It is clear to see from this case, the courts had no desire to change the law regarding assisted suicide and despite a terminal illness involved, viewed this as a criminal offence.

Due to section 2(4) of the suicide act specifying that no proceedings can be brought without the consent of the DPP, Mrs Pretty asked that her husband not be prosecuted if he helped her die. Due to the refusal of this, she then sought judicial review on the grounds that it had

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<sup>49</sup> Ibid

<sup>50</sup> (n3)

<sup>51</sup> Ibid [2]

<sup>52</sup> (n3) [42]

<sup>53</sup> (n3) [46]

violated her human rights. In *Pretty v United Kingdom*,<sup>54</sup> the European Court of Human Rights were prepared to admit that Article 8 was engaged.

“The application in this case is prevented by law from exercising her choice to avoid what she considers will be an undignified and distressing end to her life. The Court is not prepared to exclude that this constitutes an interference with her right to respect for private life as guaranteed under Article 8(1) of the Convention.”<sup>55</sup> ... “it does not consider ... the blanket nature of the ban on assisted suicide is disproportionate.”<sup>56</sup>

Later, the European Court of Human Rights stated that:

"in an era of growing medical sophistication combined with longer life expectancies, many people are concerned that they should not be forced to linger on in old age or in states of physical or mental decrepitude which conflict with strongly held ideas of self and personal identity.”<sup>57</sup>

The ECHR are reluctant to reform the law of assisted suicide and appear to agree with the decision in the House of Lords, describing the law as proportionate.

On the other hand, the case of *R (Nicklinson) v Ministry of Justice*<sup>58</sup> raised significant, moral, ethical and constitutional questions regarding the relationship and role of the domestic courts and parliament.<sup>59</sup> There was a real shift from the *Pretty* case to *Nicklinson*. Judges are now dealing with how the law should change, not whether it should.<sup>60</sup>

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<sup>54</sup> (2002) 35 E.H.R.R. 1

<sup>55</sup> *Ibid* [4]

<sup>56</sup> *Ibid* [76]

<sup>57</sup> *Ibid* [65]

<sup>58</sup> (n4)

<sup>59</sup> Nataly Papadopoulou ‘From *Pretty* to *Nicklinson*: changing judicial attitudes to assisted dying’ E.H.R.L.R. 2017, 3, 298-307, 304

<sup>60</sup> *Ibid* 299

Mr Nicklinson considered his life to be “dull, miserable, demeaning, undignified and intolerable.”<sup>61</sup> As a result of this, he wanted to end his life.<sup>62</sup> The high court held in this case that to allow active euthanasia, which is the doctor terminating life, meant a new defence had to be established to the criminal offence of murder with “any question of decriminalisation left to Parliament, as it is a controversial, difficult and sensitive moral and politico-social issue.”<sup>63</sup>

Lord Neuberger suggested a judicial model involving a judge or an independent assessor who would assess, in advance, that the individual requesting assistance makes a voluntary, clear, settled and informed wish to die. In his words, this will allow the suicide to be organised “in an open and professional way”, and at the same time, “provide greater and more satisfactory protection for the weak and vulnerable.”<sup>64</sup> This proposal was agreed with by Lord Wilson<sup>65</sup> which was also agreed with by Lord Kerr.<sup>66</sup> Similarly, Lady Hale suggested a four-part criteria that an individual should satisfy before proceeding with a request.<sup>67</sup>

“Parliament now has the opportunity to address the issue of whether section 2 should be relaxed or modified, and if so how, in the knowledge that, if it is not satisfactorily addressed ... one would expect to see the issue ... and if so, what legislation covering those in the situation of Applicants explicitly debated in the near future, either along with, or in addition to, the question whether there should be legislation along the lines of Lord Falconer's proposals.”<sup>68</sup>

Referencing Lord Falconer’s failed Bill suggests that the court expected another Bill, highlighting the need for legislative change. One of the most crucial points to come out of this case was the fact that Lady Hale and Lord Kerr both dissented in favour of a declaration of

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<sup>61</sup> (n4) [3]

<sup>62</sup> Ibid

<sup>63</sup> (n4) [84]

<sup>64</sup> (n4) [108]

<sup>65</sup> (n4) [196]

<sup>66</sup> (n4) [326]

<sup>67</sup> (n4) [314] – [316]

<sup>68</sup> (n4) [118] (Lord Neuberger)

incompatibility. The fact that two of the most senior judges in the country were prepared to issue a declaration of incompatibility is crucial.<sup>69</sup>

The Lords' attitude from *Pretty* to *Nicklinson* suggest the court has now realised that change is inevitable. The *Nicklinson* judgement demonstrated that several of the most senior judges of the country favour the legalisation of some form of assisted death. This is not only evident from the two dissenting judgments, but also from the fact that several Justices proposed assisted dying models, and explicitly criticised the s.2(1) prohibition.<sup>70</sup>

Another case that has significant value in regard to assisted suicide is the case of *Debbie Purdy*.<sup>71</sup> Until this point, the DPP would give consent to prosecution based on specific facts, but these facts remained unknown. *Debbie Purdy* argued that the DPP should be open and transparent to the criteria that they use. The DPP has published the factors that are taken into consideration when making the decision to prosecute.<sup>72</sup>

To sum up the guidance given, the Crown Prosecution Service are likely to not prosecute when there was no chance of recovery from the terminal illness and there is an unequivocal wish to commit suicide. They stated they are likely to prosecute if the victim is under the age of 18, does not have the ability to make the decision due to their illness impairing them and if pressure was put on them.<sup>73</sup>

Some argue the guidance given is a positive,

“with assisted suicide there is clarity in the law, and there is little difficulty in satisfying the evidential standard where assistance is provided, so if prosecution is to be avoided, this rests on application of the public interest test.”<sup>74</sup>

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<sup>69</sup> (n59) 307

<sup>70</sup> Ibid

<sup>71</sup> (n5) 71

<sup>72</sup> The Director of Public Prosecutions 'Suicide: Policy for Prosecutors in Respect of Cases of Encouraging or Assisting Suicide' (February 2010) < <https://www.cps.gov.uk/legal-guidance/suicide-policy-prosecutors-respect-cases-encouraging-or-assisting-suicide> > accessed 3<sup>rd</sup> May 2021

<sup>73</sup> Ibid

<sup>74</sup> Kristina Swift 'Gross negligence manslaughter: is prosecution of doctors always in the public interest and is specified prosecutorial guidance needed?' J. Crim. L. 2020, 84(4), 341-368

The guidance given has now enabled the law to be clearer, providing clarity. However, this guidance has also been criticised. Andrew Sanders critiqued it by stating,

“The DPP could have formulated a policy that simply said he would not prosecute if the ‘victim’ had a voluntary, informed, clear and settled wish to die. Instead, the focus on the motivation and role of the perpetrator restricts assisted suicide more than *Purdy* required ... the number of factors in the policy requires extensive police investigation to enable CPS to make a decision in accordance with it. Even though most suspects are not prosecuted.”<sup>75</sup>

Arguably, the guidance could be simpler and instead requires extensive police investigation. It can be argued that the guidance has actually done more harm than good and the clarity it provides is only somewhat helpful.

In the more recent case of *R. (on the application of Conway) v Secretary of State for Justice*<sup>76</sup>, the court appeared to agree with their previous decisions opposing assisted suicide stating,

“we are not in a position to say whether, if there are adequate protections which show that a blanket ban on assisted suicide is not necessary and proportionate, the line should be drawn elsewhere, such as those who are within 12 months of death.”<sup>77</sup>

It appears that the courts are not moving forward with their decision regarding assisted suicide and remains opinionated that the law is proportionate. Ultimately, this ‘throws the ball back into Parliament’s court’ as Foster suggests and it is likely this issue will not be resolved anytime soon, with individuals affected by the law and left without a remedy.<sup>78</sup>

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<sup>75</sup> Andrew Sanders ‘The CPS, policy-making and assisted dying: towards a ‘freedom’ approach. *Journal of Criminal Law.*’ (2017) ISSN 0022-0183  
<<http://sro.sussex.ac.uk/id/eprint/71867/3/AVD%20paper%20John%20Child%20collection%20final%20Oct%202017.pdf>> accessed 9<sup>th</sup> March 2021

<sup>76</sup> [2018] EWCA Civ 1431

<sup>77</sup> *Ibid* [188]

<sup>78</sup> (n17)

Despite this, in the same year, in *The Queen (on the application of OMID T) v Ministry of Justice*,<sup>79</sup> it appeared that the courts are beginning to show some compassion.

Lord Justice Erwin showed empathy in this case

“No one could read the material in this case without feeling the most profound sympathy for the Claimant. He is clearly an intelligent and sensitive man suffering deeply from his condition, and from his sense of being trapped.”<sup>80</sup>

Biggs suggested,

“By respecting the values and wishes of the individual patient, the true *best* interests of the person will be reflected in the decision-making process and the outcomes, and compassion will be at centre stage.”<sup>81</sup>

It is suggested that compassion is at the heart as to why we should accept assisted suicide. In order to value the best interests of the patient, compassion must be present and then only therefore will significant change take place.

To conclude, the recent caselaw with regard to assisted suicide suggests the courts are becoming more empathetic towards assisted suicide cases. After comparing the *Pretty*<sup>82</sup> and *Nicklinson*<sup>83</sup> cases, the UK may see further improvement in the upcoming years, as it has done slightly to now. Having said this, the change has been slow, and it is not clear exactly when significant change will take place.

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<sup>79</sup> [2018] EWHC 2615 (Admin)

<sup>80</sup> *Ibid* [2]

<sup>81</sup> Hazel Biggs ‘From dispassionate law to compassionate outcomes in health-care law, or not’ *Int. J.L.C.* 2017, 13(2), 172-183

<sup>82</sup> (n3)

<sup>83</sup> (n4)



### **Chapter three**

As a result of the increasing number of jurisdictions around the world legalising assisted suicide, there is now evidence to understand how this type of legislation works in practice. The attitude maintained by the UK Parliament regarding assisted suicide reflects a very similar opinion across almost the whole of Europe<sup>84</sup> and other countries around the world.

#### **New Zealand's approach**

Recently, New Zealand passed the End of Life Choice Act after holding a referendum that passed with a 65% majority vote.<sup>85</sup> Only a 50% majority was needed<sup>86</sup> highlighting how favourable this is. This act means that from 2021, people who meet the criteria will have the option of legally asking for medical assistance to end their lives.

It is important to note that New Zealand have a very strict criteria that needs to be met before euthanasia and assisted suicide is even considered. To be eligible for assisted dying under the act, a person must be suffering from a terminal illness likely to end their life within six months. The individual must have a significant and ongoing decline in physical capability and experience unbearable suffering that cannot be eased in a manner that they find tolerable.<sup>87</sup> Ultimately, this should open the doors to the law being overturned and an appropriate solution would be to hold a referendum.

#### **The Netherlands' approach**

Similarly, in the Netherlands, in 2017 there were 6,585 cases of voluntary euthanasia or assisted suicide. This is 4.4% of the total deaths in the Netherlands.<sup>88</sup> In the Netherlands, physicians work with the patient in order to determine whether or not they satisfy the strict

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<sup>84</sup> (n17)

<sup>85</sup> BBC News 'New Zealand euthanasia: Assisted dying to be legal for terminally ill people' Preeti Jha 30<sup>th</sup> October 2020 < <https://www.bbc.co.uk/news/world-asia-54728717>> accessed 12<sup>th</sup> April 2021

<sup>86</sup> ibid

<sup>87</sup> ibid

<sup>88</sup> Regional Euthanasia Review Committees (RTE), Annual Report 2017, < <https://derechoamorrir.org/wp-content/uploads/2019/04/2018-Informe-anual-NL-2017-eng.pdf>> accessed 12<sup>th</sup> April 2021

criteria.<sup>89</sup> This is something that is not taken lightly and demonstrates how crucial it is for this criteria to be met.

Since the *Postma* case in 1973,<sup>90</sup> the Dutch court gradually began to develop prohibitions on euthanasia and assisted suicide in the Dutch Penal Code.<sup>91</sup> The Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 amended the Criminal Code so that euthanasia and assisted suicide continue to be criminal offences under Articles 293(1) and 294(1), but there are now exceptions. These exceptions read under article 293(2)

‘The act referred to in the first subsection shall not be an offence if it is committed by a physician who fulfils the due care criteria set out in Section 2 of The Termination of Life on Request and Assisted Suicide (Review Procedures) Act, and if the physician notifies the municipal pathologist of this act in accordance with provisions of section 7, subsection 2 of the Burial and Cremation Act.’

Under section 2,<sup>92</sup> a six-part criteria was created in order to ensure that those wanting to end their lives in the Netherlands is not unreasonable.

“It is of vital importance to realize that in the Netherlands under the LRTS [Law on the Review of the Termination of life on request and assistance with Suicide] the requirements of due care are requirements that have to be met by the *physician*, not by the patient. Although the patient must indeed make his well-considered request, the decisive voice is the physician’s.”<sup>93</sup>

If the concern for the UK’s change in legislation is due to the concern that the vulnerable may be taken advantage of, a strict criteria like one of the Netherlands could be an appropriate solution. Each case in the Netherlands is considered retrospectively by a regional review committee, usually consisting of a lawyer, doctor and an ethicist.<sup>94</sup> Evidence of non-

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<sup>89</sup> Ibid

<sup>90</sup> Nederlandse Jurisprudentie 1973 No 183, District Court, Leeuwarden, 21 February 1973

<sup>91</sup> Article 293 and 294

<sup>92</sup> The Termination of Life on Request and Assisted Suicide (Review Procedures) Act 2001 Section 2

<sup>93</sup> Ton Vink, ‘Self-Euthanasia, the Dutch Experience: In Search for the Meaning of a Good Death or Eu Thanatos’ (2016) 30 Bioethics 681 – 8

<sup>94</sup> Regional Euthanasia Review Committees Annual Report 2014

compliance is rare, with 12 cases out of 6,585 in which the regional review committee found that not all of the due care criteria was met.<sup>95</sup>

Overall, this approach has a good structure, one which may resonate with the UK.

### **Canada's approach**

In Canada, the case of *Rodriguez v. British Columbia (Attorney General)*<sup>96</sup> concerned facts very similar to those in *Pretty* whereby Sue Rodriguez challenged section 241(b) of the Canadian Criminal Code, in which she argued violated her constitutional rights to life, liberty and the security of the person by prohibiting assisted suicide. The Supreme Court dismissed the application, offering reasoning similar to that in *Pretty*, having decided by a five-to-four majority in favour of the sanctity of life and protecting vulnerable persons from abuse, even though section 241(b) did impact upon the security of her person under section 7 of the Canadian Charter of Rights and Freedoms.<sup>97</sup>

Cory J, the dissenting judge, showed his compassion...

"... it follows that the right to die with dignity should be as well protected as any other aspect of the right to life. State prohibitions that would force a dreadful, painful death on a rational but incapacitated terminally ill patient are an affront to human dignity."<sup>98</sup>

The law took a turn in 2015 in the case of *Carter v. Canada (Attorney General)*<sup>99</sup> after becoming "one of the most significant decisions ever issued by the Supreme Court of Canada."<sup>100</sup> In this judgment, the unanimous decision of all nine judges overturned *Rodriguez*, finding the complete prohibition of physician-assisted death, including

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<sup>95</sup> Regional Review Committees Annual Report 2017 (2018 RTE) < <https://derechoamorir.org/wp-content/uploads/2019/04/2018-Informe-anual-NL-2017-eng.pdf> > accessed 10<sup>th</sup> May 2021

<sup>96</sup> (1993) 107 DLR (4th) 342

<sup>97</sup> (n81)

<sup>98</sup> (n96) 413

<sup>99</sup> [2015] SCC 5

<sup>100</sup> Benny Chan and Margaret Somerville, 'Converting the 'right to life' to the 'right to physician-assisted suicide and euthanasia': an analysis of *Carter v Canada (Attorney General)*, Supreme Court of Canada' *Med Law Rev.* Spring 2016; 24(2): 143-75

both euthanasia and assisted suicide, to be a violation of section 7 of the Canadian Charter of Rights and Freedoms. They argued compassion from the outset declaring that

"... people who are grievously and irremediably ill cannot seek a physician's assistance in dying and may be condemned to a life of severe and intolerable suffering. A person facing this prospect has two options: she can take her own life prematurely, often by violent or dangerous means, or she can suffer until she dies from natural causes. The choice is cruel."<sup>101</sup>

As a result of this judgement, the parliament of Canada amended section 14 of the Criminal Code to permit medical assistance in dying.<sup>102</sup> Although not binding on UK laws, Canada, a commonwealth country, overturned the law demonstrating that it is possible to do so with compassion.

### **United States' approach**

Oregon, a state in the United States of America allows for a lethal prescription by a doctor for a terminal disease.<sup>103</sup> Oregon was the first state to vote in favour of assisted suicide. During 2019, 290 lethal prescriptions were made out, with 188 patients dying from the prescription. Overall, the main concern for these patients were the loss of enjoyment and loss of autonomy.<sup>104</sup> It is important to note that in Oregon assisted suicide is only allowed when the patient is facing death within six months. The patient will then be granted their request, provided they request will full capacity, showing that the patients autonomy is respected.<sup>105</sup>

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<sup>101</sup> (n99) [1]

<sup>102</sup> (n81)

<sup>103</sup> Death with Dignity Act 1997

<sup>104</sup> Oregon Department of Human Services statistics (Feb 25 2020) < <https://deathwithdignity.org/oregon-death-with-dignity-act-annual-reports/>> accessed 10<sup>th</sup> March 2021

<sup>105</sup> Dignity in Dying 'Oregon USA' < <https://www.dignityindying.org.uk/assisted-dying/international-examples/assisted-dying-oregon/>> accessed 10<sup>th</sup> March 2021

Since Oregon legalised assisted suicide, nine other states subsequently followed in favour.<sup>106</sup> What is of real concern is that 28 states practice capital punishment<sup>107</sup> and only 10 states allow assisted suicide.<sup>108</sup> Capital punishment has ethical debates of its own, however, it is interesting that these states protest the autonomy of terminally ill patients and allow them to suffer because they find it immoral to end such lives but will willingly end lives of those convicted of crimes, sometimes wrongly.

## **Overview**

In these jurisdictions, assisted suicide is usually only prohibited when the person is suffering a terminal illness. This suggests there is room for the law to intervene. A running theme with assisted dying and euthanasia legislation is that they are regulated. Consequently, the UK has many approaches they can follow in order to regulate assisted suicide and protect its citizens.

## **Chapter four**

Under medical law, an individual has a right to refuse medical treatment if they wish. The reason for this is because of our autonomy. If you ask the question, is a person directing their action and the answer is yes, they are being autonomous. If the answer is no, they are not.<sup>109</sup>

Lord Goff stated in the case of *Airedale NHS Trust v Bland*,<sup>110</sup>

“...[the] principle of self-determination requires that respect must be given to the wishes of the patient, so that if an adult patient of sound mind refuses, however unreasonably, to consent to treatment or care by which his life would or might be prolonged, the doctors responsible for his care must give effect to his wishes, even though they do not consider it to be in his best interests to do so”.<sup>111</sup>

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<sup>106</sup> Death with Dignity ‘Death with Dignity Acts’ < <https://deathwithdignity.org/learn/death-with-dignity-acts/>> accessed 10<sup>th</sup> March 2021

<sup>107</sup> Death Penalty Information Center ‘State by State’ < <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state>> accessed 9<sup>th</sup> March 2021

<sup>108</sup> (n106)

<sup>109</sup> John Coggon and Jose Miola ‘Autonomy, liberty and medical decision-making’ C.L.J. 2011, 70(3), 523-547

<sup>110</sup> [1993] AC 789

<sup>111</sup> Ibid 865

Therefore, competent refusals are respected, no matter how unreasonable they seem. The fact that this is acceptable in the United Kingdom but assisted suicide isn't, does not sit well with ethicists. Some ethicists argue that there is no distinction between killing a patient and letting them die, in other words described as acts and omissions.<sup>112</sup>

Furthermore, Lord Browne-Wilkinson submitted,

“How can it be lawful to allow a patient to die slowly, though painlessly, over a period of weeks from lack of food, but unlawful to produce his immediate death by a lethal injection thereby saving his family from yet another ordeal to add to the tragedy that has already struck them? I find it difficult to find a moral answer to that question, but that is undoubtedly the law”.<sup>113</sup>

Although this case concerned euthanasia, it appears that Lord Browne-Wilkinson respects patients' autonomy and is pro-choice rather than pro-life.

Academic James Wilson supports the decision in this case stating,

“No-one would claim that any system can be perfect, but one does not need to resort to cliché to point out that perfection when dealing with extreme cases of human suffering is almost by definition unobtainable. The Law Lords in Bland's case reached the correct decision, in a case involving the most tragic circumstances.”<sup>114</sup>

When autonomy of the patient is respected, it appears the correct decision is reached and therefore assisted suicide should be lawful to protect the autonomy of the patient.

In the case of *Purdy*<sup>115</sup> Baroness Hale also showed her support for patient's autonomy,

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<sup>112</sup> James Rachels, 'Active and Passive Euthanasia' (1975) 292 N. Engl. J. Med. 78

<sup>113</sup> (n110) 886

<sup>114</sup> James Wilson 'A Right to Die' Criminal Law & Justice Weekly (2013) 177 JPN 197

<sup>115</sup> (n5)

"[i]f we are serious about protecting autonomy, we have to accept that autonomous individuals have different views about what makes their life worth living."<sup>116</sup>

Despite the ethic of autonomy being challenged in assisted dying cases, the concept of deontology is also challenged. Arguably, the moral solution could be to let the individual die in peace and as they wish. Despite this, the moral solution could also be to not kill an individual, no matter what the circumstances are. In terms of assisted suicide, there will never be a right or wrong answer, it will always be a matter of opinion as everyone has different views, like Baroness Hale suggested.<sup>117</sup>

The chair of the ethics committee at the British Medical Association, John Chisholm, said "the aim of medical treatment is not simply to prolong life at all costs."<sup>118</sup>

If the aim of medical treatment is not to prolong life at all costs, terminally ill patients should not be kept alive against their autonomy. In terms of utilitarianism, it would be practical to free up these spaces. It can be argued that overpopulation would be controlled too.

Controversy arises in the case of *Re B (Adult: Refusal of Medical Treatment)*.<sup>119</sup> Butler-Sloss J stated,

"Unless the gravity of the illness has affected the patient's capacity, a seriously disabled patient has the same rights as the fit person to respect for personal autonomy. There is a serious danger, exemplified in this case, of a benevolent paternalism, which does not embrace recognition of the personal autonomy of the severely disabled patient."<sup>120</sup>

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<sup>116</sup> Ibid [66]

<sup>117</sup> Ibid

<sup>118</sup> The Guardian 'New rules spell out when doctors can let patients with brain damage die' Wednesday 12<sup>th</sup> December 2018 <<https://www.theguardian.com/society/2018/dec/12/dying-guidance-patients-persistent-vegetative-state>> accessed 11<sup>th</sup> March 2021

<sup>119</sup> [2002] EWHC (Fam) 429

<sup>120</sup> Ibid [94]

In this case, a seriously disabled woman, who was competent, wishes for her ventilator to be switched off.<sup>121</sup> Despite the staff refusing, a competent refusal is to be respected. This case is arguably assisted suicide. A competent patient is entitled to autonomy and her autonomy was given to her to let her die. Fundamentally, these doctors killed the seriously disabled women by switching off her ventilator. It was an act showing intention, therefore suggesting intention to kill. If this is acceptable, assisted suicide should be. Overlooking the fact that this case is arguably assisted suicide, if a patient has capacity, then their autonomy should be respected, and this should extend to assisted suicide.

On the other hand, this can be argued to be refusal of further treatment. However, this case highlights the disputes regarding assisted suicide and autonomy. It can be argued that there is no ethical distinction between turning off a ventilator and handing someone the medication to end their life. Both of these acts are deliberate with the only difference being the intention in the former is to let the individual die and the intention in the latter is to kill.<sup>122</sup> However, assisted suicide can be interpreted as rather than 'killing', they are 'letting' them die, releasing them from their pain.

Dignity in Dying patron, Sir Patrick Stewart has argued "we have no control over how we arrive in the world but at the end of life we should have a control over how we leave it."<sup>123</sup> With this attitude, individuals will be being autonomous. His opinion is supported by England cricketer Chris Broad whose wife suffered from Motor Neurone Disease. Her life ended when her suffering became too much.

"We are, by nature creatures who make decisions and like company, why then if we are struck down with an incurable disease are, we forced to end our lives alone?"<sup>124</sup>

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<sup>121</sup> (n84) [4]-[6]

<sup>122</sup> James Goodman 'The Case of Dr Munro: Are there Lessons to be Learnt?' *Med Law Rev* (2010) 18 (4): 564

<sup>123</sup> Campaign for Dignity in Dying 'SIR PATRICK STEWART, IAN MCEWAN AND CHRIS BROAD JOIN DIGNITY IN DYING'S CAMPAIGN TO LEGALISE ASSISTED DYING' 21st February 2011

<<https://www.dignityindying.org.uk/news/sir-patrick-stewart-ian-mcewan-chris-broad-join-dignity-dyings-campaign-legalise-assisted-dying/>> accessed 9<sup>th</sup> March 2021

<sup>124</sup> *Ibid*



On the other hand, the campaign group 'Care Not Killing' opposes the right to die, arguing that the law should remain. Responding to the Supreme Court's ruling on Conway,<sup>125</sup> they expressed their opinion being:

"The judges, parliamentarians, doctors and disability rights groups are all in agreement – that the safest law is the one we currently have. It carefully balances an individual's rights with the need to protect vulnerable people, who could feel pressured into ending their lives."<sup>126</sup>

To conclude, assisted suicide opens the doors to doctors having the power to decide when a patient's life is not worth living. In the Netherlands in 1990, approximately 1,000 patients were killed without their request.<sup>127</sup> This takes away the autonomy of the patient and places it with the doctor, giving the doctor the ultimate decision. Reports from the Netherlands reveal that doctors do not always report euthanasia and physician assisted suicide.<sup>128</sup> Lack of data means we could never truly control something as crucial as assisted suicide.

However, in order to protect those vulnerable people who could potentially be pressured into ending their lives, a strict criteria could be put in place in order to ensure that this does not happen. If a criteria is put in place for those who are terminally ill they are allowed to exercise their autonomy. The option is either die now or later and this should be done autonomously.<sup>129</sup>

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<sup>125</sup> (n76)

<sup>126</sup> (n13)

<sup>127</sup> Irish Times 'Dutch euthanasia is hardly death with dignity' Breda O'Brien (April 14<sup>th</sup> 2001) < <https://www.irishtimes.com/opinion/dutch-euthanasia-is-hardly-death-with-dignity-1.301554>> accessed 3<sup>rd</sup> May 2021

<sup>128</sup> David Gibbes Miller, Scott Y H Kim 'Euthanasia and physician-assisted suicide not meeting due care criteria in the Netherlands: a qualitative review of review committee judgements' BMJ Open < <https://bmjopen.bmj.com/content/bmjopen/7/10/e017628.full.pdf>> accessed 3<sup>rd</sup> May 2021

<sup>129</sup> LSE Emily Jackson 'UK Citizens can access assisted suicide, but they must travel to Zurich in order to do so. This is illogical, but more importantly, it imposed an unfair burden on terminally ill individuals' (June 3<sup>rd</sup> 2011) < <https://blogs.lse.ac.uk/politicsandpolicy/assisted-dying/>> accessed 9<sup>th</sup> March 2021

## Conclusion

To conclude, cases in the future should be approached with change. Society has an impact on how our laws evolve and it is clear that society has adapted their views to this controversial debate, as this article demonstrates. Lord Justice Toulson stated the Tony Nicklinson case<sup>130</sup> was “tragic” presenting “society with legal and ethical questions of the most difficult kind.”<sup>131</sup> This was acknowledged in 2012 and many years later, nothing has changed...

Despite this, it is encouraging to see that there has been recent judicial regard for compassion towards these patients and the respect for their autonomy.<sup>132</sup> It is also encouraging that assisted suicide has been predicted by a leading tory MP to become legalised within the next four years.<sup>133</sup>

Moving forward, the approach of other jurisdictions who are legalising assisted suicide and who respect the autonomy of their citizens, should be followed. A vulnerability assessment could also be required to allow individuals that request assisted suicide, ensuring the flood gates are not opened to those who simply want to abuse the system.

There is nothing wrong with ending the lives of those suffering. Although it will happen to every single person, no one knows what it is like to die. Lawmakers are hiding behind a ‘veil of ignorance.’<sup>134</sup> Death is inevitable and the terminally ill should not suffer because of lawmakers discomfort surrounding death. It is society’s time to decide who is in charge. Ultimately, the question is whether medical law, medical ethics or medical morality should overrule.

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<sup>130</sup> (n4)

<sup>131</sup> Ibid [1]

<sup>132</sup> (n97)

<sup>133</sup> Sky News ‘Assisted dying could be legalised in the UK within four years, leading MP predicts’ 24<sup>th</sup> August 2020 < <https://news.sky.com/story/assisted-dying-could-be-legalised-in-the-uk-within-four-years-leading-mp-predicts-12055523>> accessed 7<sup>th</sup> May 2021

<sup>134</sup> John Rawls, *A theory of Justice* (Harvard UP: Cambridge, MA, 1971)

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